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Preempting Indian Preemption: Cotton Petroleum Corp. v. New Mexico

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NOTES

PREEMPTING INDIAN PREEMPTION: *COTTON PETROLEUM CORP. V. NEW MEXICO*

The indigenous peoples[1] of North America maintained sovereign political and legal institutions well before the Europeans discovered and conquered them.[2] Integrating these peoples, and their institutions, into the system of constitutional federalism that their conquerers eventually developed has proven problematic from the earliest days of European rule.[3] Policies toward the Indians have ranged from "benign neglect,"[4] to attempted geno-

1. This Note refers to the aboriginal inhabitants of North America and their descendants by their common English language designations: as Indians generally and by the English language names of the tribes specifically. Some of these English tribal names are approximate translations of the tribes' own self-identifying terms (e.g., Blackfeet, Crow). Other English names were given by other persons, often historical enemies, and may be considered offensive by some tribal members (e.g., Navajo, Apache, Sioux). Because the general reader is not familiar with the more appropriate term, this Note employs the conventional names. These terms, including Indian, the use of which is not uncontroversial, are used with care.

2. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982) (Stevens, J., dissenting); United States v. Wheeler, 435 U.S. 313, 322 (1978).

3. *See* Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations,* 132 U. PA. L. REV. 195, 200-05 (1984); *see also* Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence,* 1986 WIS. L. REV. 219. The Williams article presents an interesting perspective on preconstitutional relations between Europeans and non-Europeans and how these early relations helped shape the current interactions between the United States and Indian tribes.

Other constitutional federal systems in North America have encountered many of the same difficulties in the integration of Indians. The issues that Canada confronted in integrating Indians into its system bear special similarity, particularly given the English common law heritage in Canada. Because of this heritage, and because Canada's constitutional history largely postdates that of the United States, Canadian law regarding Indians tends to track developments in the United States. For example, the Supreme Court of Canada frequently analyzes United States Supreme Court decisions before reaching its own decision. Johnston, *A Theory of Crown Trust Towards Aboriginal Peoples,* 18 OTTAWA L. REV. 307, 318 (1986).

However, there are considerable differences between decisions reached by the two high courts. This deviation results from different constitutional and statutory frameworks as well as from different historical experiences. Nonetheless, examination of Canadian law may prove somewhat illuminating, particularly when the Canadian Supreme Court or Parliament has acted with the United States' example in mind. Consequently, this Note will occasionally make reference to Canadian law as it relates to the point under discussion.

4. This terminology gained currency from Patrick Moynihan's 1970 memorandum to President Nixon as a recommendation for national policy towards the African-American family. N.Y. Times, Apr. 7, 1985, § 1, at 1, col. 2, and at 15, col. 1. The phrase aptly describes the

cide,[5] to forced assimilation into the majority culture.[6] The United States Constitution is largely silent with respect to Indian political or legal institutions. Only two references to Indians exist in the Constitution: the commerce clause,[7] which addresses the distribution of power between the State and Federal Governments to regulate trade with the Indian tribes; and article II, section 2, which contemplates the exclusion of Indians "not taxed" from the apportionment of congressional representatives.[8] Yet, Indian institutions continue to exist, in varying forms, with varying levels of success.

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persistent inattentiveness of American society with regard to Indian affairs. *See generally* V. DELORIA, CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 12-13 (1969) (stating that the Federal Government typically responds to Indian problems by appointing, but subsequently ignoring, a task force). The Nixon administration did not apply such a policy in Indian country. Rather, it carried out an activist Indian program. *See* President Nixon's Annual Message to the Congress on the State of the Union, *reprinted in* 1974 PUB. PAPERS 56, 75-76 (1975). Indeed, many Indian leaders remember the Nixon Presidency as the most progressive and sympathetic Administration in the last several decades. Cohen, *Tribal Enterprise,* ATLANTIC MONTHLY, Oct. 1989, at 33.

5. While murder may have never been the official policy of the United States, General Sheridan's often quoted remark that the only "good" Indian is a dead Indian undoubtedly reflected the attitude of many persons both in and out of government. *See* E. CONNELL, SON OF THE MORNING STAR 179-80 (1984) (similar remark attributed to Territorial Delegate James Cavanaugh (D-Mont.)).

6. *See infra* text accompanying notes 57-60.

7. "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8, cl. 3.

8. *Id.* § 2, cl. 3. The first sentence of this clause reads as follows:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

Id. The effect of this sentence was altered by section 2 of the fourteenth amendment, which reads: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." *Id.* amend. XIV, § 2.

Indians have been citizens of the United States since 1924. Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (1988)). As citizens, Indians are entitled to vote in national elections. Means v. Wilson, 522 F.2d 833, 839 (8th Cir. 1975), *cert. denied,* 424 U.S. 958 (1976). However, Indians "not taxed" are excluded from the population for purposes of congressional apportionment. 2 U.S.C. § 2a (1988) (language identical to section 2 of the fourteenth amendment). Whether all Indians are counted toward apportionment may turn on whether the word "taxed" refers to the actual payment of taxes. If so, there could conceivably be a number of exclusions. The phrase "not taxed" may mean merely that those Indians are not liable for federal income taxation. If this interpretation is correct, then all Indians would be included in calculations of congressional apportionment, because all Indians are subject to federal income taxation. Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418, 421 (1935). The clause also may refer to state rather than federal taxes, in which case the broad coverage of the Internal Revenue Code is irrelevant. Congress and the courts have not settled the exact meaning of the words "not taxed." Indeed, the Attorney General of the United States found the problem perplexing, and declined

While the legal and political supremacy of the Federal Government over tribal governments has been long established, often as a result of military supremacy, the relationship between the tribal governments and the governments of the states within which the tribes are located has presented a more complex set of issues.[9] Indeed, competition between the states and tribes to exercise jurisdiction over non-Indians within reservations is heated.[10] In recent years, the United States Supreme Court has decided cases concerning conflicting assertions of state and tribal jurisdiction over various activities of non-Indians within reservations, including criminal offenses,[11] hunting and fishing,[12] property development,[13] and taxation.[14] Considering the relative abundance of energy-producing natural resources located on reservations,[15] it is not surprising that in recent years competition over the right to tax energy development and extraction has frequently found its way into the courts.

In *Cotton Petroleum Corp. v. New Mexico,*[16] the United States Supreme Court considered whether the United States Constitution permits a state to collect severance taxes from a non-Indian corporation that produces oil on

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to render an opinion. 39 Op. Att'y Gen. 518, 519-20 (1940). In any event, the Census Bureau counts all Indians and makes no attempt to differentiate between those who have and have not paid federal or state taxes, or between those who are and are not subject to state taxation. Telephone interview with Pat Heelen, Deputy Counsel for the Census Bureau (Oct. 27, 1989).

9. One facet of the relationship, however, is well settled: "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980).

10. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government,* 33 STAN. L. REV. 979, 985 n.24 (1981). However, the interests of states and tribes are not completely mutually exclusive. *See* Note, Crow Tribe v. Montana: *New Limits on State Intrusion into Reservation Rights, New Lessons for State and Tribal Cooperation,* 50 MONT. L. REV. 133, 163 (1989) (noting that states and tribes share an interest in protecting high coal taxes from congressional preemption).

11. *See, e.g.,* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (holding that tribal courts do not have criminal jurisdiction over non-Indians).

12. *See, e.g.,* Montana v. United States, 450 U.S. 544, 566 (1981) (holding that the state may regulate non-Indian hunting and fishing on non-Indian fee land within a reservation).

13. *See, e.g.,* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 109 S. Ct. 2994, 3009 (1989) (holding that a county may zone property within a reservation when the zoning does not threaten the tribe's political integrity).

14. *See, e.g.,* Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 845 (1982) (holding that the state may not tax gross receipts earned by a non-Indian contractor in constructing school buildings on a reservation).

15. It has been estimated that tribes own approximately fifty percent of the nation's privately owned uranium, approximately thirty-three percent of the Western coal, and approximately four percent of the oil in the United States. J. HARLAN, AMERICAN INDIANS TODAY 56-57 (1987).

16. 109 S. Ct. 1698 (1989).

an Indian reservation.[17] Cotton Petroleum Corporation (Cotton) operates approximately sixty-five oil wells on reservation land leased from the Jicarilla Apache Tribe,[18] pursuant to the federal Indian Mineral Leasing Act of 1938 (1938 Act).[19] The Jicarilla Apache Tribe collects from Cotton severance taxes on oil produced on the reservation[20] as well as rental fees and royalties.[21] In addition, the State of New Mexico levies five separate taxes on Cotton that amount to approximately eight percent of total production value.[22]

Cotton unsuccessfully challenged the Jicarilla Apache Tribe's right to collect severance taxes on oil production.[23] The corporation subsequently paid state severance taxes under protest and brought an action in state court challenging the state's right to levy taxes.[24] Cotton protested the imposition of state severance taxes on several federal constitutional grounds: the Indian commerce clause, the interstate commerce clause, the due process clause, and the supremacy clause.[25] The lower court upheld the state's jurisdiction to tax Cotton's oil production, and the New Mexico Court of Appeals affirmed.[26] After the New Mexico Supreme Court denied review of the case,[27] the United States Supreme Court granted certiorari.[28]

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17. *Id.* at 1702.

18. *Id.* at 1703. The reservation encompasses 742,135 acres. *Id.* at 1702. The Jicarilla Apache Tribe has approximately 2,500 members. *Id.*

19. Act of May 11, 1938, Pub. L. No. 75-506, 52 Stat. 347 (codified as amended at 25 U.S.C. §§ 396a-396g (1982)).

20. J.A.T.C. §§ 11-1-1 to -15 (Equity 1987). The United States Secretary of Interior, through the Acting Area Director of the Bureau of Indian Affairs, approved the tax ordinance in 1976. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 539 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982).

21. The Jicarilla Apache Tribe collects a royalty of 12.5%. *Cotton*, 109 S. Ct. at 1703. Cotton also pays the assignor of the leases a royalty of 12.5%. *Id.* at 1703 n.3.

22. *Id.* at 1703 n.4. *See also* N.M. STAT. ANN. §§ 7-29-1 to -8, 7-30-1 to -14, 7-31-1 to -11, 7-32-1 to -15, 7-34-1 to -9 (1986).

23. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982). The *Cotton* Court suggested that the dispute before it arose due to a footnote in *Merrion*. *Cotton*, 109 S. Ct. at 1703. Justice Stevens, author of the Court's opinion in *Cotton*, strongly dissented in *Merrion*. *Merrion*, 455 U.S. at 190 (Stevens, J., dissenting).

24. *Cotton*, 109 S. Ct. at 1704.

25. *Id.*

26. Cotton Petroleum v. State, 106 N.M. 517, 522, 745 P.2d 1170, 1175 (Ct. App.), *cert. quashed*, 106 N.M. 511, 745 P.2d 1159 (1987), *aff'd*, 109 S. Ct. 1698 (1989).

27. Cotton Petroleum v. State, 106 N.M. 511, 745 P.2d 1159 (1987).

28. Cotton Petroleum Corp. v. New Mexico, 485 U.S. 1005 (1988). The Court invited the parties to brief an additional question: " 'Does the [c]ommerce [c]lause require that an Indian Tribe be treated as a [s]tate for purposes of determining whether a state tax on nontribal activities conducted on an Indian Reservation must be apportioned to account for taxes imposed on those same activities by the Indian Tribe?' " *Id.* The Court answered this question in the negative. *Cotton*, 109 S. Ct. at 1716.

The Supreme Court affirmed the decision of the New Mexico Court of Appeals, rejecting each of Cotton's constitutional claims.[29] Writing for the majority, Justice Stevens determined that neither the Indian commerce clause nor the interstate commerce clause barred the state taxes.[30] Furthermore, the Court asserted that an imperfect fit between a state's taxation of a particular taxpayer and a state's provision of services to that taxpayer does not violate the due process clause.[31] Moreover, the Court rejected Cotton's supremacy clause argument based on its determination that there was no evidence of congressional intent to create an exemption from state taxation for Cotton.[32] Rather than holding that one tax preempted another, the Supreme Court concluded that the state and the Jicarilla Apache Tribe have concurrent taxation jurisdiction in this case.[33] Consequently, Cotton must pay taxes to both the state and the tribe.[34]

Justice Blackmun, writing for the dissent,[35] focused exclusively on the supremacy clause issue.[36] The dissent challenged the majority's reasoning as contradicting a recent Supreme Court decision,[37] which held that Congress intended that the 1938 Act guarantee Indians the maximum return for their natural wealth.[38] Therefore, because the New Mexico taxes interfered with this goal, the state was preempted from collecting the taxes.[39] Justice Blackmun analyzed the legislative history of the 1938 Act in its historical context and determined that the Court's earlier contradictory decision provided a better interpretation of the 1938 Act.[40] Even without the statutory evidence, however, the dissent found sufficient justification in the Court's recent prior holdings on Indian preemption to conclude that New Mexico could not collect taxes for oil produced on an Indian reservation.[41]

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29. *Cotton,* 109 S. Ct. at 1713-16. The Court was divided six to three; Chief Justice Rehnquist, and Justices White, O'Connor, Scalia, and Kennedy joined Justice Stevens, who wrote the majority opinion for the Court. *Id.* at 1702. Justices Brennan and Marshall joined Justice Blackmun, who filed a dissenting opinion. *Id.*

30. *Id.* at 1716.

31. *Id.* at 1715.

32. *Id.* at 1713.

33. *Id.* at 1714.

34. *See id.*

35. *Id.* at 1716 (Blackmun, J., dissenting).

36. However, in a footnote, the dissent agreed with the Court's conclusion that the interstate commerce clause did not apply to the facts of this case. *Id.* at 1716-17 n.1.

37. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985). *See infra* notes 168-75 and accompanying text.

38. *Blackfeet,* 471 U.S. at 767 n.5.

39. *Cotton,* 109 S. Ct. at 1717-18.

40. *Id.* at 1717-21.

41. *Id.* at 1726.

This Note briefly examines the concept of tribal sovereignty as it affects state jurisdiction. Next, it discusses the definition and evolution of the doctrine of Indian preemption. It then examines the preemption cases that involve the 1938 Act. Further, this Note analyzes the decision in *Cotton Petroleum Corp. v. New Mexico,* its impact on the doctrine of Indian preemption, and its impact on Indian tribes. This Note concludes that the present statutory structure provides for sovereign, federally dependent, Indian governments. However, while applying the form but not the substance of Indian preemption analysis, the *Cotton* Court erroneously failed to calculate the clearly predictable impact these taxes will have on the Jicarilla Apache Tribe and thereby reached a result that will create serious negative consequences on Indian economic life.

I. TRIBAL SOVEREIGNTY: AT THE SUFFERANCE OF CONGRESS

A. The Early Years: John Marshall's Wall

The United States Supreme Court determined early that Indian tribes were not "foreign States" within the meaning of the Constitution, when in 1831 it rejected the assertion that the Court had original jurisdiction to hear a dispute between a tribe and a State.[42] The Court subsequently rendered its first conclusive determination of the relative jurisdictions of states and Indian tribes in *Worcester v. Georgia.*[43] Writing for the Court, Chief Justice John Marshall concluded that the Constitution assigned to the Federal Government the exclusive authority to conduct relations with Indian tribes.[44] Consequently, this exclusivity barred application of any state law over In-

42. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). The Cherokee Nation tribe asserted original jurisdiction on the basis of article III, section 2 of the United States Constitution. *Id.* at 11. Article III, section 2 grants the federal courts jurisdiction in cases "between a State . . . and foreign States, Citizens or Subjects" and grants the United States Supreme Court original jurisdiction to hear cases "in which a State shall be a Party." U.S. CONST. art. III, § 2, cls. 1, 2.

43. 31 U.S. (6 Pet.) 515 (1832).

44. *Id.* at 559-61. Federal authority over Indians granted by the Constitution, which is greater than federal power over Indians conferred by the Articles of Confederation, is tantamount to federal succession to the power of the British Crown, asserted in the Royal Proclamation of 7 October 1763. *See* Mohegan Tribe v. Connecticut, 638 F.2d 612, 615-16 (2d Cir. 1980), *cert. denied,* 452 U.S. 968 (1981). By this Proclamation, made eight months after the end of the Seven Years' (French and Indian) War, the Crown forbade alienation of Indian lands to private parties and regulated trade with the Indians. Royal Proclamation of 7 October 1763, *reprinted in* CAN. REV. STAT. App. II, No. 1 (1985).

dian tribes,[45] creating a jurisdictional "wall" between the States and the Indian tribes.[46]

The Court could have reached the same result under an inherent tribal sovereignty theory.[47] However, by finding that the Constitution controlled, thus barring state jurisdiction, the Court effectively decreed that the tribes' political and legal posture henceforth would be defined exclusively by the Federal Government.[48] Although the United States continued the colonial practice of signing treaties with the tribes as though they were foreign nations, the relationship between the tribes and the United States indeed "resemble[d] that of a ward to [its] guardian."[49]

The concept of Indian tribes as "domestic dependent nations"[50] that conducted relations with the United States largely by treaty prevailed until the post-Civil War Reconstruction period.[51] In 1871, the United States House of Representatives, which previously had been largely excluded from direct involvement in Indian relations,[52] attached a rider to an appropriations bill mandating that the United States would no longer enter into treaties with

45. *Worcester,* 31 U.S. (6 Pet.) at 561 ("The Cherokee nation . . . is a distinct community . . . in which the laws of Georgia can have no force."). *Cf.* CAN. REV. STAT. ch. I-5, § 88 (1985) (all provincial laws apply on Indian reserves unless specifically contradicted by federal statute).

46. Note, *Indian Sovereignty: Confusion Prevails*—California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083 (1987), 63 WASH. L. REV. 169, 170 (1988).

47. The Court could have chosen to exclude the tribes, as sovereign entities, from the federal structure outlined by the Constitution, a reading that is not inconsistent with the document itself, or with the lack of tribal ratification of the Constitution. Consequently, the Court could have found that state laws are no more applicable within the Indian territories than they are within Canada, Mexico, or the District of Columbia. *See generally* Ball, *Constitution, Courts, Indian Tribes,* 1987 AM. B. FOUND. RES. J. 3.

48. Tribal sovereignty is "at the sufferance of Congress and is subject to complete defeasance." United States v. Wheeler, 435 U.S. 313, 323 (1978). Lord Mansfield stated the common law analogue of this policy in Campbell v. Hall, 1 Cowp. 204, 209, Lofft 665, 741, 98 Eng. Rep. 1045, 1047 (K.B. 1774) (ruling that the laws of a conquered country continue in effect until altered by the conqueror).

49. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

50. *Id.*

51. Near contemporaneity and similarity in goals evidence a relationship between the Reconstruction and Allotment periods. Both eras were defined by policies that attempted to assimilate racial minorities into American society. Recent historical scholarship on Reconstruction allows reexamination of the relationship between the policies. *See, e.g.,* E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988) (comparing the policies underlying Reconstruction with the concurrent actions taken by Congress).

52. The executive branch, usually the War Department, negotiated the treaties and submitted them to the Senate for ratification. U.S. CONST. art. II, § 2, cl. 2. The Constitution restricted the role of the House of Representatives to appropriating money to cover commitments made in the treaties. Antoine v. Washington, 420 U.S. 194, 201-03 (1975).

the tribes.[53] Subsequently, all Indian relations were conducted by acts of Congress or Executive orders rather than by treaty.[54] While the acts or orders were sometimes based upon agreements negotiated with the tribes,[55] neither Congress nor the President was required to obtain the consent of the tribes, the practice of which had been at least a nominal part of a treaty making regime.[56] As a result, the Indians' legal and political status became more clearly a function of federal authority.

An important result of this policy change was that congressional intent in enacting specific pieces of legislation became determinative of the scope and structure of Indian institutions to an extent not conceivable under the prior treaty system. The intent of Congress, central to the issue of tribal-state relations, and demonstrated by the General Allotment (Dawes) Act of

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53. The rider stated: "[N]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Act of March 3, 1871, 25 U.S.C. § 71 (1982).

54. Often, the President acted to reserve from the public domain specific lands that the War Department hoped to transfer to a tribe. *See, e.g.*, Exec. Order of July 5, 1873, *reprinted in* 1 C. KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES 855-56 (1904) (temporarily reserving lands for the Gros Ventre, Piegan, and other tribes, pending negotiations).

55. *See, e.g.*, Act of April 27, 1904, Pub. L. No. 58-183, 33 Stat. 352 (ratifying an agreement made with the Crow Tribe).

56. Congress' power over tribes is plenary, that is, without subject matter limitation. Laurence, *Learning to Live With the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams'* Algebra, 30 ARIZ. L. REV. 413, 418 (1988). *See also* Williams, *Learning Not to Live With Eurocentric Myopia: A Reply to Professor Laurence's* Learning to Live With the Plenary Power of Congress Over the Indian Nations, 30 ARIZ. L. REV. 439, 445-46 (1988); Laurence, *On Eurocentric Myopia, The Designated Hitter Rule and "The Actual State of Things,"* 30 ARIZ. L. REV. 459 (1988). Residents of the District of Columbia also have learned to live with Congress' plenary power. As one might expect, the relationship between Congress and District residents is not always harmonious. *See, e.g., supra*, SPECIAL ISSUE. *District of Columbia: The "State" of Controversy.*

Congress' plenary power over Indian tribes includes the right to unilaterally abrogate treaties. Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903). Of course, constitutional limitations apply to Congress. For example, Congress may not take tribal property without just compensation. Shoshone Tribe of Indians v. United States, 299 U.S. 476, 496-97 (1937). *See also* United States v. Sioux Nation of Indians, 448 U.S. 371, 407-15 (1980).

Under Canadian law, the Royal Proclamation of 7 October 1763 has been termed an "Indian Bill of Rights." St. Catherines Milling & Lumber Co. v. The Queen, 13 S.C.R. 577, 652 (Can. 1887) (Gwynne, J., dissenting), *aff'd*, 14 App. Cas. 46, 60 L.T.R. 197 (P.C. 1888). *See generally* Pentney, *The Rights of the Aboriginal Peoples of Canada and the Constitution Act 1982: Part I - The Interpretive Prism of Section 25*, 22 U. BRIT. COLUM. L. REV. 21 (1988). Under Canadian law, treaties are considered analogous to contracts. *See* Attorney-General for Canada v. Attorney-General for Ontario, 1897 App. Cas. 199, 213 (P.C.); *see also* Regina v. Sikyea, 46 W.W.R. 65, 69, 43 D.L.R.2d 150, 154, 43 C.R. 83, 87, [1964] 2 C.C.C. 325, 330 (N.W.T.C.A.) (analogy to contract principles extended to include promises other than for payments for land and the possibility of breach by the government), *aff'd*, 1964 S.C.R. 642.

1887,[57] called for assimilation of the Indians, as individuals, into American life. The Dawes Act contemplated that when such assimilation occurred, Indians would be brought totally under state jurisdiction,[58] with all residual sovereignty as well as the entire system of federal "guardianship" fading away.[59] Similarly, during this same period, the Supreme Court allowed states to exercise some jurisdiction over non-Indians on reservations.[60] Thus, Congress and the Court breached the jurisdictional "wall" between the states and the tribes.

B. Tribal Sovereignty Recaptured: The Indian Reorganization Act

The progressive dismantling of Indian cultural,[61] political, and legal institutions continued from the 1880's into the 1930's. Spurred by a strong reform movement,[62] Congress passed the Indian Reorganization (Wheeler-Howard) Act of 1934 (IRA).[63] Passed for the purpose of extending to the tribes "the fundamental rights of political liberty and local self-government,"[64] the IRA provided a mechanism for tribal promulgation of, and federal approval of, constitutions for participating tribes.[65]

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57. Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (1982)).

58. 25 U.S.C. § 349 (1982).

59. Numerous commentators have analyzed extensively the history of the General Allotment Act. *See, e.g.*, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 130-43 (R. Strickland & C. Wilkinson ed. 1982) [hereinafter F. COHEN]; *see also* D. OTIS, HISTORY OF THE ALLOTMENT POLICY, *reprinted in Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Committee on Indian Affairs*, 73d Cong., 2d Sess. 428-40 (1934).

60. *See, e.g.*, Draper v. United States, 164 U.S. 240, 247 (1896) (holding that state courts rather than federal courts have criminal jurisdiction over non-Indians within reservations); Utah & N. Ry. v. Fisher, 116 U.S. 28, 31-32 (1885) (holding that a territory may levy a property tax on non-Indian fee land within a reservation); Langford v. Monteith, 102 U.S. 145, 147 (1880) (stating that a state's civil jurisdiction may extend over non-Indians within a reservation unless expressly prohibited by treaty).

61. *See* F. COHEN, *supra* note 59, at 140 n.126 (describing the role of federal boarding schools in repressing all aspects of Indian culture).

62. *See* K.R. PHILP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM 1920-1954, at 114-18, 154-58 (1977). John Collier, an ardent reformer, was appointed Commissioner of Indian Affairs by President Franklin D. Roosevelt in 1933. F. COHEN, *supra* note 59, at 146.

63. Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1982)).

64. S. REP. NO. 1080, 73d Cong., 2d Sess. 3-4 (1934) (letter from President Roosevelt). The pre-IRA political condition of Indian reservations had been characterized as "an extraordinary example of political absolutism in the midst of a free democracy . . . which has used methods of repression and suppression unparallelled in the modern world outside of Czarist Russia and the Belgian Congo." 78 CONG. REC. 11,729 (1934) (statement of Rep. Howard, cosponsor of the IRA).

65. 25 U.S.C. § 476 (1982). Of the 258 tribes that held elections within the prescribed period, only 77 rejected reorganization under the IRA. Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 972 (1972).

While integration of Indians into American society remained the ultimate goal, the IRA focused on the tribe as a governmental unit, rather than on individual Indians.[66] Indians assimilated pursuant to the IRA were allowed to retain their tribal identities and governments.[67] In addition, Congress enacted other laws intended to help the reorganized tribal societies achieve economic self-sufficiency.[68] These additional enactments, including the Indian Mineral Leasing Act of 1938,[69] comprised vital components of the IRA self-sufficiency program.[70]

By explicitly rejecting allotment and dissolution of the tribes as entities,[71] the IRA represented a retreat from the assumption that Indians eventually would be brought completely under state jurisdiction. While the IRA has been very controversial among both Indians and non-Indians,[72] and although Congress temporarily abandoned the concept of the IRA during the ill-fated termination experiment,[73] it continues today to provide the definitive framework for tribal sovereignty.[74]

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66. F. COHEN, *supra* note 59, at 147.

67. *Id.*

68. *See, e.g.,* Act of Sept. 1, 1937, 25 U.S.C. §§ 500-500n (1982) (federal acquisition, organization, and management of reindeer industry); Act of Aug. 27, 1935, Pub. L. No. 74-355, 49 Stat. 891 (codified as amended at 25 U.S.C. §§ 305a-305c (1982) (federal promotion of Indian arts and crafts industry).

69. Act of May 11, 1938, Pub. L. No. 75-506, 52 Stat. 347 (codified as amended at 25 U.S.C. §§ 396a-396g (1982)).

70. F. COHEN, *supra* note 59, at 152.

71. 25 U.S.C. §§ 461, 463(a) (1982); *see also* Mattz v. Arnett, 412 U.S. 481, 496 (1973).

72. *See* Comment, *supra* note 65, at 972-79.

73. Congress' termination policy, adopted in the early 1950's, sought the abolition of tribal governments and the end of the special relationship between the Federal Government and the tribes. Fourteen tribes were terminated before the experiment was abandoned in 1962. *See generally* Note, *Terminating the Indian Termination Policy,* 35 STAN. L. REV. 1181 (1983) (describing the immediate and long term adverse effects of the termination policy on Indian culture, autonomy, and self-sufficiency).

74. It is not self-evident that the encouragement of separate political and legal structures for Indians, alone among minorities in the United States, is the correct policy alternative. A contrary body of opinion exists that finds the policy of self-determination a fight against the tide of history. *See, e.g.,* Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?,* 51 NOTRE DAME LAW. 600, 634 (1975) (concluding that "reality is that the tribe cannot be separate, if only because historical forces and the Indian's . . . partial integration are irreversible"). The controversy is not new; as early as 1824, J.B. Robinson, then-Attorney-General for Upper Canada, stated " 'To talk of [making] treaties with . . . Indians, residing in the heart of one of the most populous districts of [Ontario], . . . is much the same . . . as to talk of making a treaty of alliance with the Jews in Duke street or with the French emigrants who have settled in England.' " Sero v. Gault, 50 O.L.R. 27, 31-32, 64 D.L.R. 327, 330 (1921). The same argument can be made today concerning Indians in the United States.

Whether self-determination is the correct model is a question that Congress must decide, and the IRA is the current approach. Congress reiterated its commitment to self-determina-

II. INDIAN PREEMPTION DOCTRINE

In contrast to the periodic changes in the nature of tribal sovereignty, the notion that absent congressional grant, state law has no force over Indians in Indian territory has remained since the 1830's.[75] Because Indian land is actually "owned" by the United States[76] and is held in trust[77] for the tribes, the Federal Government's general immunity from state taxation precludes the imposition of state property taxes on Indian land.[78] However, state taxation of non-Indian interests located on reservations raises more problems. At one time, the Court extended the tribes' taxation immunity to include non-Indians.[79] After the Court subsequently rejected this approach,[80] the doctrine of preemption evolved as a bar to state taxation of non-Indian economic relations with tribes.

A. Preemption Defined

In 1965, the Supreme Court's decision in *Warren Trading Post Co. v. Arizona Tax Commission*[81] introduced Indian preemption as a doctrine distinct from other supremacy clause preemption doctrines. Indian preemption differs from other preemption primarily because of the unique, somewhat fidu-

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tion recently with the Indian Self-Determination and Education Act of 1975. 25 U.S.C. §§ 450, 450a (1982).

75. *See* Williams v. Lee, 358 U.S. 217, 220-21 (1959).

76. The Supreme Court first recognized the United States' title to Indian land in Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 603 (1823). Chief Justice Marshall based his conclusion on the "doctrine of discovery," although he acknowledged the Royal Proclamation of 7 October 1763 as an alternative basis for decision. *Id.* at 594-95, 597. *See also* Newton, *supra* note 3, at 208 n.69; *see* Guerin v. The Queen, 1984 2 S.C.R. 335, 376-78, 13 D.L.R.4th 321, 335-36, 1984 6 W.W.R. 481, 496 (Can.). The Supreme Court of Canada explored the United States Supreme Court's holdings concerning the nature of the Indian ownership interest in these lands in its landmark aboriginal title case Calder v. Attorney-General of British Columbia, 1973 S.C.R. 313, 339-44, 34 D.L.R.3d 145, 164-68, [1973] 4 W.W.R. 1, 19-24 (Can.) (opinion of Judson, J.).

77. *See* Chambers, *Judicial Enforcement of Federal Trust Responsibility to Indians,* 27 STAN. L. REV. 1213, 1213-14 (1975); *see also* Johnston, *A Theory of Crown Trust Towards Aboriginal Peoples,* 18 OTTAWA L. REV. 307, 317-28 (1986); Comment, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites,* 38 CATH. U.L. REV. 705, 724-26 (1989).

78. *See, e.g.,* The New York Indians, 72 U.S. (5 How.) 761 (1867); The Kansas Indians, 72 U.S. (5 How.) 737, 755 (1867). *See also* 28 U.S.C. § 1360(b) (1982) (congressional grant of civil jurisdiction over Indian country to states does not include right to tax trust property); Bryan v. Itasca County, 426 U.S. 373, 390 (1976) (states lack jurisdiction to tax reservation Indian's personal property absent congressional consent); *cf.* CAN. REV. STAT. ch. I-5, § 87 (1985) (Indian tax exemptions).

79. Gillespie v. Oklahoma, 257 U.S. 501, 506 (1922), *overruled,* Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938).

80. Helvering v. Mountain Producers Corp., 303 U.S. 376, 387 (1938).

81. 380 U.S. 685 (1965).

ciary, relationship between the distinctly sovereign Indian tribes and the Federal Government.[82] The difference results from the rule that courts construe federal statutes generously in the Indians' favor, therefore, preemption is not limited to express congressional action.[83] In contrast, when the Court does not employ the generous statutory construction afforded to Indians, it presumes that state law is not preempted " 'unless [such preemption] was the clear and manifest purpose of Congress.' "[84]

In *Warren Trading Post,* the State of Arizona levied a two percent tax on the gross proceeds of sales of a non-Indian retail trader operating on the Navajo Reservation.[85] The trader, acting pursuant to federal statute,[86] obtained a license from the Federal Government, permitting him to conduct business on the reservation.[87] In a unanimous decision, the Court found that the several federal statutes concerning trade with the Indians[88] precluded any state role in regulating Indian trade.[89] In addition, the Court determined that the tax might impose a financial burden on either the retailer or the Indian customers, and that the tax "could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians."[90] For this reason, the Court found that the state was without the power to tax the trader for "sales made to reservation Indians on the reservation."[91] The Court did not base this finding on the fact that the Indian reservation was federally owned.[92] Rather, the Court focused on the existence of a federal regulatory structure and recognized that the tax would have a substantial economic impact on Indian economic life.[93]

The Court articulated the modern preemption doctrine eight years later in *McClanahan v. Arizona State Tax Commission.*[94] In *McClanahan,* the State of Arizona imposed an income tax on a reservation Indian who derived all of her income from reservation sources.[95] The Arizona Court of Appeals up-

82. F. COHEN, *supra* note 59, at 273.

83. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980).

84. Milwaukee v. Illinois, 451 U.S. 304, 316 (1981) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

85. *Warren Trading Post,* 380 U.S. at 685.

86. 25 U.S.C. § 264 (1982). The Federal Government required licenses for Indian traders since the first Congress. *See* Act of July 22, 1790, 1 Stat. 137.

87. *Warren Trading Post,* 380 U.S. at 686.

88. *Id.* at 688 n.7.

89. *Id.* at 691.

90. *Id.*

91. *Id.* at 691-92.

92. *Id.* at 691 n.18.

93. *Id.* at 691. The Court apparently did not require petitioner to show actual injury to either the federal regulatory scheme or the tribal economy as a result of this tax.

94. 411 U.S. 164 (1973).

95. *Id.* at 166. The amount in the controversy was $16.20. *Id.*

held the tax on the theory that because the tax burdened the individual Indian rather than the tribe, the state's tax did not affect the rights of the tribe as a self-governing body.[96]

The United States Supreme Court, after a thorough discussion of the history of Indian sovereignty, rejected the reasoning of the court of appeals. Justice Marshall, writing for a unanimous Court, asserted that although the tax did not fall directly on the tribe, there might be an important, protectable federal interest in the individual Indian's economic condition. The Court's conclusion that reservation Indians were exempt from state taxation was not based on the fact that state taxation might affect a specific federal program, as had existed in *Warren Trading Post,*[97] but rather on the exclusivity of the relationship between Indians and the Federal Government and the concomitant lack of state jurisdiction.[98] The Court employed Indian sovereignty as the backdrop against which it analyzed relevant treaties and statutes. However, it did not view Indian sovereignty as a controlling factor.[99] As in *Warren Trading Post,* the *McClanahan* Court emphasized the extensive degree of federal involvement in Indian life.[100] Although the relevant treaty[101] and statute[102] examined in *McClanahan* did not expressly exempt reservation Indians from state taxation, the Court found that the federal role in Indian life was so pervasive that any state taxation was foreclosed.[103]

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96. McClanahan v. State Tax Comm'n, 14 Ariz. App. 452, 457, 484 P.2d 221, 226 (1971), *rev'd,* 411 U.S. 164 (1973).

97. The Court referred to several unrelated federal statutes as evidence of Congress' general intent that states could not tax Indians. *McClanahan,* 411 U.S. at 176-77.

98. *Id.* at 177. The Court noted that Congress provided a method by which Arizona could acquire civil and criminal jurisdiction over the Navajo Reservation, but that Arizona had not availed itself of this procedure. *Id.* at 177-78.

99. *Id.* at 172.

100. *See id.* at 173 n.12. Although the state did have some role in funding education and welfare within the reservation, the Court found that the Federal Government met the greater share of such needs. *Id.*

101. Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667, 668. Because treaties were to be interpreted most favorably to the Indians, the Court determined that the silence concerning authorization of state taxation in the treaty meant that "the Navajo treaty . . . preclude[s] extension of state law - including state tax law - to Indians on the Navajo Reservation." *McClanahan,* 411 U.S. at 175.

102. Arizona Enabling Act, Pub. L. No. 61-219, 36 Stat. 557, 569 (1910). *See McClanahan,* 411 U.S. at 175 n.14. The Arizona Enabling Act's silence concerning state taxation of reservation Indians did not meet the requirement of an express congressional grant of state taxation jurisdiction. *Id.* at 175.

103. *McClanahan,* 411 U.S. at 179-80. The Indian's "activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." *Id.*

Under the pervasive federal role theory, a state's showing of substantial expenditures and interests on reservations proved unavailing as a justification for the extension of state taxation jurisdiction. For example, in *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation,*[104] the Supreme Court unanimously rejected the argument that, because the state operated school systems and provided and maintained a system of roads on the reservation, the state could levy its personal property tax, used to raise revenue for schools and roads,[105] on automobiles owned and operated by Indians on the reservation.[106] The Court asserted that so long as the tribe retained its tribal organization, the Court would apply preemption analysis despite the Indians' business and social integration with a substantial non-Indian population living on the reservation.[107] Relying on *McClanahan,* the Court determined that the state could not tax the automobiles without congressional consent.[108] The Court also found that the state was barred from taxing cigarettes sold on the reservation to reservation Indians.[109]

B. Marketing the Exemption

The taxes invalidated in *Warren Trading Post, McClanahan,* and *Moe* represented various state efforts to tax reservation Indians for economic activities on a reservation.[110] Attempts to limit the applicability of the tax

104. 425 U.S. 463 (1976).

105. *Id.* at 467 (quoting Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Moe, 392 F. Supp. 1297, 1313 (D. Mont. 1975), *aff'd,* 425 U.S. 463 (1976)).

106. *Id.* at 469.

107. Tribal members only comprised approximately nineteen percent of the total reservation population. *Id.* at 466. Based on the substantial non-Indian character of reservation-land ownership patterns, as well as on the character of the population, Montana argued unsuccessfully that the Dawes Act operated to extend state taxation jurisdiction to all land within the reservation that was not retained by the United States in trust for the tribe. *Id.* at 471. The Court rejected this argument on two grounds. First, the Court determined that focusing on actual land ownership of individual tracts to determine state jurisdiction would create an " 'impractical pattern of checkerboard jurisdiction' " that was contrary to the intent of federal policy. *Id.* at 478 (quoting Seymour v. Superintendent, 368 U.S. 351, 358 (1962)). Second, the Court asserted that Congress, by enacting the IRA, had repudiated, albeit not repealed, the policies of the Dawes Act. *Id.* at 479.

108. *Id.* at 476 (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)).

109. *Id.* at 480-81. Montana also argued that enforced tax exemption for Indians was a violation of the due process and equal protection rights of non-Indians. The Court rejected this theory, noting that if special federal treatment of Indians was impermissible, then title 25 of the United States Code would be erased entirely, and two centuries of federal commitments to tribes could not be honored. *Id.* at 480. The Court did not explain how the constitutional rights of citizens of the United States became subordinate to acts of Congress or Executive orders.

110. State taxation of Indian economic activity conducted outside the reservation was upheld in the companion case to *McClanahan,* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

exemption for the economic activity of non-Indians on reservations have fared better from the states' perspective.[111] Another major issue in *Moe* was whether an Indian-owned and operated cigarette shop was required to collect a state tax on nonexempt customers.[112] If the state could not require the Indian cigarette retailers to collect the tax, they could sell cigarettes to nonexempt customers at a substantial discount.[113] The tribes argued that the burden imposed by the state cigarette tax fell on the Indian retailer, thereby inflicting measurable losses.[114]

The Supreme Court rejected this argument, basing its opinion on the lower court's finding that the tax statute created a conclusive presumption that the tax fell on the retail customer.[115] The Court recognized that the Indian retailer's refusal to collect the tax, rather than advancing the tribe's legitimate right not to be so taxed, merely allowed nonexempt customers to flout their legal obligation.[116] Furthermore, the Court found that the burden on the tribal economy of requiring the Indian retailer to collect the state tax was minimal and therefore was not within the scope of the preemption doctrine.[117]

Four years after the *Moe* decision, the Supreme Court decided *Washington v. Confederated Tribes of the Colville Indian Reservation*, another case involving state taxation of Indian-owned automobiles and cigarette sales.[118] While the result in this case closely paralleled that of *Moe*, factual circumstances produced a schism in the Court's previous consensus.[119] Whereas in *Moe* the Salish and Kootenai Tribes had not played a direct role in cigarette

111. *See generally* Fredericks, *State Regulation in Indian Country: The Supreme Court's Marketing Exemptions Concept, A Judicial Sword Through the Heart of Tribal Self-Determination*, 50 MONT. L. REV. 49 (1989) (suggesting that courts should strictly scrutinize alleged marketing exemptions).

112. Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 467-68 (1976). The Court did not reach the issue of whether the tax exemption extended to Indians who resided on the reservation but were not members of the Confederated Salish and Kootenai Tribes.

113. At the time the case was decided, the cigarette tax totalled $1.20 per carton, including special excise taxes earmarked to benefit war veterans and to retire public bonded indebtedness. MONT. REV. CODE ANN. § 84-5606 (1975 Supp.). This tax is now $1.80 per carton. MONT. CODE ANN. § 16-11-111 (1989).

114. *Moe*, 425 U.S. at 481.

115. *Id.* at 482 (citing MONT. REV. CODE ANN. § 84-5601(1) (1947) (current version at MONT. CODE ANN. § 16-11-112 (1989)).

116. *Id.*

117. *Id.* at 483.

118. 447 U.S. 134 (1980).

119. *Id.* Justice White wrote the opinion of the Court in which all Justices joined at least partially. However, Justices Brennan (joined by Justice Marshall), Rehnquist, and Stewart each filed a separate opinion dissenting from various sections of the Court's opinion. *Id.* at 137.

marketing,[120] in *Colville,* the tribes[121] were directly involved in the cigarette business through sales taxes[122] or, in one instance, retail outlets.[123] Because the cigarettes marketed by the tribes did not originate on or have any significant nexus with the reservation, the Court found that these marketing schemes were not essential components of the tribes' post-IRA economic self-determination effort.[124] Therefore, the IRA did not preempt the state taxes.[125] In addition, the Court determined that the fact that the Indian taxing ordinances were federally approved did not constitute a proper delegation by Congress of the federal power to preempt state taxes.[126]

The Court employed a balancing test to decide whether the taxes infringed on tribal self-government. Specifically, the Court weighed the tribes' interest in taxing products not produced on the reservation but sold to taxpayers who did not use tribal services against the state's interest in taxing the same goods provided to recipients of state services.[127] Ultimately, the Court determined that the State of Washington's interest prevailed. The Court found no nonrevenue purposes for the tribal cigarette businesses. Consequently, the Court asserted that state taxation would not disturb or disarrange any federal regulatory scheme.[128] The Court concluded that because the market for cigarettes sold to non-Indians was entirely due to the tax exemption, the tribes were, in effect, marketing tax exemptions, not cigarettes. For this reason, the Court opined that any adverse impact created by eliminating the tax

120. *See Moe,* 425 U.S. at 467. Although the tribes leased the land upon which the stores were located, there was no indication that the Salish and Kootenai Tribes had any management or regulatory role. *Id.*

121. *Colville,* 447 U.S. at 143-44. The tribes involved were the Confederated Tribes of the Colville Reservation, the Makah, the Lummi, and the Confederated Tribes of the Yakima Nation. *Id.*

122. *Id.* at 141, 144-45. Tribal taxes on cigarettes ranged from 22.5 to 50 cents per carton. Washington's tax was $1.60 per carton. *Id.*

123. *Id.* at 144-45.

124. *Id.* at 155.

125. *Id.* Justice Brennan dissented from this portion of the opinion. *Id.* at 168 (Brennan, J., concurring and dissenting).

126. *Id.* at 156. Justice Brennan also disagreed with the Court on this point. *Id.* at 172 (Brennan, J., concurring and dissenting).

127. *Id.* at 157. Justice Rehnquist, in his separate opinion, suggested that the focus of the inquiry should be on congressional intent, rather than a balancing of interests. *Id.* at 177 (Rehnquist, J., concurring and dissenting).

128. *Id.* at 158.

exemption neither violated the Indian commerce clause[129] nor compelled the state to provide the consumers with a credit to offset the tribal tax.[130]

C. *A Particularized Inquiry: The* Bracker *Balancing Test*

The Court's lack of an Indian preemption doctrine composed of a well-defined body of principles[131] became apparent when, within weeks of *Colville,* the Court divided along different lines in *White Mountain Apache Tribe v. Bracker.*[132] In *Bracker,* the Supreme Court considered whether the State of Arizona could impose a motor vehicle license and fuel use tax on a non-Indian company for its logging operations conducted on a reservation pursuant to a contract with the tribe.[133] Writing for the majority, Justice Marshall, after recounting the analysis in *McClanahan,*[134] defined the preemption analysis as "a particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . designed to determine whether, in the specific context, the exercise of state authority would violate federal law."[135] As in *Warren Trading Post,* a pervasive federal regulatory structure existed that state taxation could upset.[136] The tribal interest at stake

129. *Id.* at 157. The Court suggested that the Indian commerce clause has a "limited role to play" in preventing states from placing undue burdens on Indian commerce. *Id.* Because the commerce involved in this case was an artificial creation of the tax exemption, the Court did not consider the imposition of the tax, although it may end the commerce entirely, as an impermissible burden. *Id.* at 157-58.

130. *Id.* Justice Stewart, in his separate opinion, suggested that an offset credit would be appropriate because the state and tribal taxation schemes, with the exception of the Yakima arrangement, were substantially the same in operation. *Id.* at 175-76 (Stewart, J., concurring and dissenting).

The Court also reached an issue not decided in *Moe,* determining that the Indian tax exemption was a consequence of political rather than racial status. Therefore, Indians living on the reservation who were not members of the governing tribe had to pay all applicable state taxes. *Id.* at 160-61.

Consequently, while the Court has continued to use the term "non-Indian" to describe persons not exempt from state taxes, the correct term should be "nonmember." The Court has been criticized for its continued use of the term "non-Indian" without clarifying the distinction between non-Indian and nonmember. Duro v. Reina, 851 F.2d 1136, 1139-41 (9th Cir. 1987) *rev'd* 110 S. Ct. 2053 (1990). This Note continues to use the term "non-Indian" to denote a person not a member of the governing tribe.

131. *Colville,* 447 U.S. at 176 (Rehnquist, J., concurring and dissenting).

132. 448 U.S. 136 (1980) (5-1-3 decision). Justice Marshall wrote the opinion of the Court in which Chief Justice Burger and Justices Brennan, White, Blackmun, and Powell joined. Justice Powell filed a concurring opinion. Justice Stevens filed a dissenting opinion in which Justices Stewart and Rehnquist joined.

133. *Id.* at 137-38.

134. *Id.* at 141-45.

135. *Id.* at 145. In *McClanahan,* the Court defined the state's interest as "regulating the affairs of non-Indians." McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171 (1973).

136. The Court recounted in detail the applicable federal regulations. *Bracker,* 448 U.S. at 146-49.

was the continued viability of its timber economy.[137] This tribal interest was in effect equivalent to the federal interest by virtue of a federal policy which encouraged tribes to revitalize tribal governments and to assume control over tribal economies.[138] Against these interests, the state indicated that it had a general desire to raise revenues.[139]

The balancing test employed by the Court in *Bracker* differed from that used in *Colville.* In *Colville,* the Court used a balancing test only to determine state jurisdiction in relation to tribal sovereignty.[140] By contrast, the Court in *Bracker,* as it had in *McClanahan,*[141] mentioned tribal sovereignty as a bar to state jurisdiction, but in *Bracker* based its decision on supremacy clause grounds by balancing the Federal Government's role and interests against the state's role and interests.[142]

Dissenting in *Bracker,* Justice Stevens[143] noted that the total tax burden Arizona sought to impose would amount to considerably less than one percent of the non-Indian contractor's total annual profits.[144] According to Justice Stevens, this was not enough to disturb and disarrange the federal regulatory scheme.[145] Based on the probable lack of impact on federal interests, the dissent argued that absent a stronger showing of congressional intent, the federal interests should not preempt the state tax.[146]

Justice Marshall applied the *Bracker* balancing test again in his majority opinion in *Ramah Navajo School Board, Inc. v. Bureau of Revenue.*[147] In *Ramah,* New Mexico imposed a 3.75% gross receipts tax on a non-Indian contractor who was constructing buildings for a reservation school district.[148] Pursuant to standard industry practice, the tribe reimbursed the contractor for taxes the contractor paid to the state.[149] In this case, the

137. *Id.* at 149-50.

138. *Id.* at 149 (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151 (1973)).

139. *Id.* at 150. The Court rejected Arizona's argument that the tax generally helped to offset the cost of roads because the Federal Government, or the tribe, built all of the on-reservation roads used by this timber operation. *Id.*

140. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 157 (1980).

141. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172-73 (1973).

142. *Bracker,* 448 U.S. at 142-45.

143. *Id.* at 153 (Stevens, J., dissenting).

144. *Id.* at 158-59.

145. *Id.* at 157.

146. *Id.* at 159.

147. 458 U.S. 832, 846 (1982).

148. *Id.* at 834. *See also* N.M. STAT. ANN. § 7-9-4 (1978). The New Mexico legislature increased the gross receipts tax rate to 4.75%. *Id.* § 7-9-4 (1988).

149. *Ramah,* 458 U.S. at 835. The lower court refused to find the state preempted from levying this tax because the tax was legally incident on the non-Indian contractor. Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 95 N.M. 708, 710, 625 P.2d 1225, 1227 (Ct.

Court identified the primary federal interest as tribal control of education.[150] While the state tax may have only marginally compromised tribal control of education, the Court found that the state's interest in the tax was negligible.[151] Although New Mexico argued that it had supplied services of considerable value to the contractor in support of its activities off the reservation, the Court found that the fact that the tribe actually paid the taxes made this argument irrelevant.[152] Relying on *Bracker,* the Court invalidated the state tax.[153]

In a strongly worded dissent, Justice Rehnquist[154] criticized the Court's reliance on *Bracker,* arguing that the mere probability of tribal injury had dominated the balance.[155] Under the *Moe* and *Colville* decisions, the fact of injury did not end the analysis. Justice Rehnquist, therefore, concluded that without more evidence of congressional intent than general statutes giving Indians control of education, the majority was incorrect in holding that federal law preempted taxes on school construction.[156]

Finally, the Court in *California v. Cabazon Band of Mission Indians*[157] clarified the *Moe* and *Colville* holdings by asserting that the determinative factor in those cases was the origination of the product sold on the reservations. In *Cabazon,* the Court determined that the Cabazon Band did not have to submit to state regulation its high stakes bingo games.[158] The fact

App. 1980), *cert. quashed,* 96 N.M. 17, 627 P.2d 412 (1981), *rev'd,* 458 U.S. 832 (1982). Although the tax impacted the tribe, the impact was by virtue of a private arrangement between the tribe and the contractor. *Ramah,* 458 U.S. at 835-56.

150. *Ramah,* 458 U.S. at 840.

151. *Id.* at 843-45.

152. *Id.* at 844 & n.8.

153. *Id.* at 845. The Court also rejected the Solicitor General's argument that the Court should modify its preemption analysis to find state taxation jurisdiction presumptively preempted by the Indian commerce clause. *Id.* at 846. The Solicitor advanced, as a primary reason in support of this change, that the change would add certainty to, and thus help simplify, lower court consideration of preemption questions. *Id.* at 845-56. Stating that its analysis was clear enough, the Court opined that its consistent admonishment that lower courts must construe federal statutes relating to Indians liberally in the Indians' favor would protect Indian interests as lower courts apply the *Bracker* balancing test. *Id.* at 846.

154. Justice Rehnquist was joined in his dissent by Justices White and Stevens. *Id.* at 847.

155. *Id.* at 848 (Rehnquist, J., dissenting).

156. *Id.* at 854-55.

157. 480 U.S. 202, 219 (1987).

158. *Id.* at 216-18. The Court concluded that state regulation of tribal bingo was inconsistent with the congressional policy of encouraging tribal economic self-sufficiency. *Id.* at 221. As evidence of this policy, the Court cited the Indian Financing Act of 1974 (codified as amended at 25 U.S.C. §§ 1451-1543 (1982 & Supp. III 1985)) and the Indian Self-Determination and Education Assistance Act of 1975 (codified as amended at 25 U.S.C. §§ 450-450n (1982 & Supp. III 1985)). The Court also relied on President Reagan's 1983 statement on Indian policy: "It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-govern-

that the revenue generated by the bingo games originated on the reservation, coupled with the fact that the Cabazon Band had virtually no other resources to develop, overcame the state's articulated interest in preventing the spread of organized crime.[159] Justice Stevens dissented,[160] suggesting that the more appropriate test was whether Congress granted the tribe an exemption from state jurisdiction, not whether the tribe was burdened by state regulation.[161]

As the doctrine of Indian preemption developed through 1987, the Court focused on whether a specific legitimate state interest outweighed the possible impact of state taxation on tribal economic life. Although congressional intent was an essential element, the Court was willing to infer intent from the broad policies underlying even indirectly related statutes.[162] The Court extended the exemption from taxes to non-Indian contractors when taxing them would injure the tribe. The Court established an exception to the rule of no state jurisdiction to tax, where the tribes imported products from outside the reservation for resale at tax exempt prices. Under this exception, the state could impose taxes on non-Indian purchasers.

III. PREEMPTION BASED ON THE 1938 ACT

Congress passed the Indian Mineral Leasing Act of 1938[163] as part of the overall IRA scheme to promote tribal economic and political self-sufficiency.[164] Specifically, the 1938 Act gave tribes a direct role in deciding whether, and under what conditions, they should lease tribal lands for mineral development.[165] The 1938 Act also simplified leasing procedures and removed technical barriers to leasing with the explicit aim of encouraging tribal economic development.[166]

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ment." 19 WEEKLY COMP. PRES. DOC. 99 (Jan. 24, 1983). These laws and pronouncements are only marginally related to bingo.

159. *Cabazon,* 480 U.S. at 220.

160. Justice Stevens was joined in his dissent by Justices O'Connor and Scalia. *Id.* at 222.

161. *Id.* (Stevens, J., dissenting).

162. *See supra* note 158.

163. Pub. L. No. 75-506, 52 Stat. 347 (codified as amended at 25 U.S.C. §§ 396a-396g (1982)).

164. *See supra* notes 63-74 and accompanying text.

165. *Compare* 25 U.S.C. § 396a (1982) (expressly providing for tribal consent to leases) *with* 25 U.S.C. § 399 (1982) (silent concerning tribal consent to leases).

166. *See* H.R. REP. NO. 1872, 75th Cong., 3d Sess. 2 (1938); S. REP. NO. 985, 75th Cong., 1st Sess. 2 (1937).

A. Montana v. Blackfeet Tribe of Indians: *Preemption by Canon of Construction*

Congress explicitly authorized state taxation of tribal mineral interests in a 1924 amendment to the original Indian mineral leasing statute enacted in 1891.[167] While the 1938 Act did not include any language concerning state taxation of the extraction of tribally owned minerals, the Supreme Court held, in *Montana v. Blackfeet Tribe of Indians,*[168] that congressional silence did not constitute express consent to such taxation. Moreover, the Court asserted that Congress intended the 1938 Act to repeal the express consent given under the 1924 Amendment.[169] At issue in *Blackfeet* were several state value-based oil and gas production taxes, the full amount of which the non-Indian lessees had paid.[170] The lessees deducted the portion of the taxes attributable to the Blackfeet Tribe's royalty interest from royalty payments made to the tribe.[171]

Justice Powell, writing for the Court, found that the general repealer clause of the 1938 Act overrode the earlier tax authorization found in the 1891 Act and the 1924 amendment.[172] Justice Powell based his conclusion on a distinction in the broadly defined goals of Congress between the Dawes Act period,[173] during which the 1891 Act and 1924 amendment had been passed, and the IRA period, of which the 1938 Act was an important component. Although courts usually do not give general repealers much effect,[174] the Court held that the canon of statutory construction, under which federal statutes are construed liberally in favor of Indians, allowed the 1938 Act's lack of authorization of taxation to mandate the Court's conclusion.[175]

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167. The Act of May 29, 1924, Pub. L. No. 68-158, 43 Stat. 244 (codified at 25 U.S.C. § 398 (1982)) supplemented the Act of Feb. 28, 1891, 26 Stat. 795 (codified at 25 U.S.C. § 397 (1982)). The purpose of the 1924 amendment was to end applicability of the intergovernmental immunity doctrine to non-Indian mineral lessees on reservations created by an act of Congress. Congress passed an additional amendment in 1927 to end the applicability of intergovernmental immunity on reservations created by Executive order. Indian Oil Act of 1927, Pub. L. No. 69-702, 44 Stat. 1347 (codified at 25 U.S.C. § 398c (1982)).

168. 471 U.S. 759, 766 (1985).

169. *Id.* at 767 n.5.

170. *Id.* at 761.

171. *Id.*

172. *Id.* at 767.

173. *Id.* at 766-67.

174. "It is hornbook law that a general repealer is in 'legal contemplation a nullity.' " Blackfeet Tribe of Indians v. Montana, 729 F.2d 1192, 1204 (9th Cir. 1984) (Blaine Anderson, J., concurring and dissenting) (quoting 1A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 23.08, at 221 (4th ed. 1972)), *aff'd,* 471 U.S. 759 (1985).

175. *Blackfeet,* 471 U.S. at 767.

Because *Blackfeet* came to the Court as a result of a grant of summary judgment in the lower court,[176] several important issues were not fully developed for appeal. For example, the Supreme Court did not address the issue of whether the tribe actually bore the burden of the taxes. The United States Court of Appeals for the Ninth Circuit had ordered consideration of this question on remand.[177]

B. Crow Tribe of Indians v. Montana: *A Restatement of Preemption*

The *Crow Tribe of Indians v. Montana*[178] case arose from Montana's attempt to collect coal severance taxes from non-Indian coal producers on lands leased from the Crow Tribe pursuant to the 1938 Act.[179] The tribe challenged these taxes before the United States Court of Appeals for the Ninth Circuit on two occasions. Each time the court wrote a comprehensive opinion.[180] Inasmuch as the Supreme Court summarily affirmed *Crow II* in 1988,[181] these opinions constituted the most complete exposition of the law of preemption prior to *Cotton.*

In *Crow I,* the lessee, rather than the tribe, bore a statutory obligation to pay the coal severance taxes at issue,[182] ranging as high as thirty percent of the mine mouth value of the coal.[183] Because the coal underlay land that the

176. Blackfeet Tribe of Indians v. Montana, 507 F. Supp. 446, 453 (D. Mont. 1981), *aff'd sub nom.* Blackfeet Tribe of Indians v. Groff, 729 F.2d 1185 (9th Cir. 1982), *op. withdrawn,* 709 F.2d 521 (9th Cir. 1983), *aff'd in part, rev'd in part,* Blackfeet Tribe of Indians v. Montana, 729 F.2d 1192 (9th Cir. 1984) (en banc), *aff'd,* 471 U.S. 759 (1985).

177. *Blackfeet,* 729 F.2d at 1203. The tax statute created a presumption that the tax was legally incident on the non-Indian producer, although the producer was being taxed on the tribes' interest. *Id.* The Ninth Circuit directed the district court to use the criteria in Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981), *amended,* 665 F.2d 1390 (9th Cir.), *cert. denied,* 459 U.S. 916 (1982) (*Crow I*), to determine whether the tax created an unacceptably heavy indirect burden on the tribe. *Id.*

178. Crow Tribe of Indians v. Montana, 469 F. Supp. 154 (D. Mont. 1979), *rev'd,* 650 F.2d 1104 (9th Cir. 1981), *amended,* 665 F.2d 1390 (9th Cir.), *cert. denied,* 459 U.S. 916 (1982) (*Crow I*), *on remand* Crow Tribe of Indians v. United States, 657 F. Supp. 573 (D. Mont. 1985), *rev'd sub nom.* Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir. 1987), *aff'd,* 484 U.S. 997 (1988) (*Crow II*).

179. *Crow I,* 650 F.2d at 1107.

180. *See* cases cited *supra* note 178. Although the Ninth Circuit decided *Crow I* before *Blackfeet,* the Supreme Court affirmed *Crow II* after it decided *Blackfeet.* This chronology explains the order of discussion of these cases in this Note.

181. Montana v. Crow Tribe of Indians, 484 U.S. 997 (1988). Chief Justice Rehnquist would have heard the case. *Id.*

182. *Crow I,* 650 F.2d at 1108 (citing MONT. CODE ANN. § 15-35-104 (1979)).

183. MONT. CODE ANN. § 15-35-103 (1985). The Supreme Court upheld application of this tax to non-Indian coal in 1981. Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981). The tax rate was lowered in 1987. MONT. CODE ANN. § 15-35-103 (1989). The Crow Tribe imposes a 25% severance tax on all coal mined within the reservation. CROW TRIB. COAL TAXATION CODE tit. I §§ 1-13 (1982). This tax is applicable to tribal coal mined

Crow Tribe had ceded to the United States in 1904,[184] and because the land was several miles north of the present Crow Indian Reservation, the state provided virtually all services. The tribe, in contrast, provided no services to area residents and businesses.[185]

The United States District Court for the District of Montana dismissed the Crow Tribe's challenge of this tax for failure to state a claim upon which relief could be granted.[186] The court reasoned that the 1938 Act did not preempt the state's imposition of the severance tax because the tribe did not have a legal obligation to pay the taxes.[187] The Ninth Circuit in *Crow I* reversed, remanding the case to the district court.[188] The Ninth Circuit held that although the legal obligation to pay coal severance taxes was indeed on the non-Indian producer, the alleged economic effects of the tax, if proven at trial, could constitute an unreasonable burden on tribal interests protected by the 1938 Act.[189] In its complaint, the tribe alleged that the state tax drastically reduced the market for the tribe's coal.[190] However, the court of appeals agreed with the State of Montana that some impact on the tribe could be justified if the state interest was sufficiently legitimate, provided the impact on the tribe was not excessive.[191]

On remand, the district court again found the tax permissible, reasoning that the state's interests were legitimate and that the tax did not cause the economic injuries alleged by the tribe.[192] Upon the Crow Tribe's appeal of the district court's remand decision, the Ninth Circuit issued its *Crow II* opinion[193] that contained a comprehensive restatement of Indian preemp-

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outside the reservation boundaries pursuant to the Crow Tribal Constitution. CROW TRIB. CONST. art. VI, § X (1982).

184. Act of April 27, 1904, Pub. L. No. 58-183, 33 Stat. 352. In 1958, Congress compelled the Crow Tribe to accept ownership of that part of the 1904 cession not already alienated from the United States. Act of May 19, 1958, Pub. L. No. 85-420, 72 Stat. 121. For this reason, the Ninth Circuit ruled that the coal underlying the ceded and restored area was a part of the reservation for purposes of satisfying the on-reservation test of Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). *Crow II*, 819 F.2d at 898.

185. Crow Tribe of Indians v. United States, 657 F. Supp. 573, 579-83 (D. Mont. 1985) (lower court decision in *Crow II*), *rev'd sub nom.* Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 484 U.S. 997 (1988).

186. Crow Tribe of Indians v. Montana, 469 F. Supp. 154, 164 (D. Mont. 1979) (lower court's decision in *Crow I*), *rev'd*, 650 F.2d 1104, *amended*, 665 F.2d 1390 (9th Cir.), *cert. denied*, 459 U.S. 916 (1982).

187. *Id.* at 162-64.

188. *Crow I*, 650 F.2d at 1117.

189. *Id.* at 1112.

190. Crow Tribe of Indians v. Montana, 469 F. Supp. at 157. *See also Crow II*, 819 F.2d at 899-900.

191. *Crow I*, 650 F.2d at 1113.

192. Crow Tribe of Indians v. United States, 657 F. Supp. at 587-89.

193. *Crow II*, 819 F.2d at 896-98.

tion analysis. The Ninth Circuit found that the first step in preemption analysis was to determine whether the tax interfered with the policies underlying the 1938 Act.[194] Relying on evidence that showed that sales of Montana coal decreased in the period after the imposition of the tax,[195] which was in direct contradiction of the lower court's factual findings concerning the cause of the decrease,[196] the Ninth Circuit concluded that the state severance tax compromised the federal goals underlying the 1938 Act.[197]

The second step in the Ninth Circuit's preemption analysis required the court to determine whether the state tax imposed a burden on the tribe.[198] The court determined that Montana had not proven that the impact of its taxes was "negligible."[199] Consequently, the court employed the *Bracker* balancing of interests[200] and rejected Montana's argument that it could, after *Moe* and *Colville,* tax non-Indians whose activities were conducted off the reservation.[201] The court, relying on *Cabazon,* limited the application of *Moe* and *Colville* to cases of importation of goods not produced on the reservation, goods which the Ninth Circuit found clearly distinguishable from the coal at issue in *Crow II.*[202] The court determined that the Crow coal, a reservation resource, was essential to the tribe's economic development, thereby furthering an important federal goal underlying the IRA.[203] Finding a compromise of the federal goal, the court analyzed whether the state interest was sufficient to justify the assessment of a severance tax.[204]

In addition to its general interest in raising revenue, Montana argued that it had an interest in protecting the environment and preserving coal for future generations to hedge against the cyclical booms and busts of the state's historically mineral based economy.[205] In considering Montana's claimed interest in environmental protection, the court found that the tax statute itself was not narrowly tailored to meet this goal.[206] Specifically, the court

194. *Id.* at 898.

195. The parties disputed the cause of this decline. Montana argued that the decline in sales of Montana coal, relative to sales of Wyoming coal, was caused by the increased population in Wyoming's traditional market area, and by the lower sulfur content of Wyoming coal. *Id.* at 899-900. Montana also contended that the relative cost of coal transportation was a major factor in the decline of the sales. *Id.* at 900.

196. Crow Tribe of Indians v. United States, 657 F. Supp. at 588-89.

197. *Crow II,* 819 F.2d at 900.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 899.

202. *Id.*

203. *Id.* at 898; *see also* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 767 (1985).

204. *Crow II,* 819 F.2d at 900.

205. *Id.; see also Crow I,* 650 F.2d at 1113-14.

206. *Crow II,* 819 F.2d at 901.

discounted the state's need for the tax statute as a measure for environmental control because other state and federal regulations largely served those purposes.[207] The court also questioned the state's environmental justification for the statute because the state spent only 8.75% of the coal severance tax revenue for environmental or coal-development impact-related purposes by 1981.[208] Furthermore, the Ninth Circuit repeated its finding in *Crow I* that the state did not have a legitimate interest in appropriating the tribe's mineral wealth.[209] Therefore, because the coal severance tax did not advance a legitimate state interest and because the tax burdened federal policy, the court found that Montana was preempted from collecting this tax.[210] The United States Supreme Court summarily affirmed this decision in early 1988.[211] However, one year later, in *Cotton Petroleum Corp. v. New Mexico,*[212] the Court substantially altered the *Crow II* analysis.

IV. *COTTON PETROLEUM CORP. V. NEW MEXICO:* A NEW FOCUS

In 1976, Cotton Petroleum Corporation acquired five oil and gas leases on the Jicarilla Apache Reservation in New Mexico.[213] Pursuant to the Indian Oil Act of 1927,[214] the state collected five separate oil taxes from Cotton.[215] In 1982, Cotton paid the state taxes under protest.[216] Cotton subsequently brought an action in state court seeking a refund of taxes it paid, on the theory that New Mexico levied these taxes in violation of the Indian and interstate commerce clauses, the due process clause, and the supremacy clause of the United States Constitution.[217] In an unpublished opinion, the District Court for the First Judicial District, Santa Fe County denied re-

207. *Id.*

208. *Id.*

209. *Id.* at 902 (quoting *Crow I,* 650 F.2d at 1114).

210. *Id.* The court also found that the Montana tax was barred on the independent ground that it infringed on tribal sovereignty, *id.* at 903, which the Supreme Court defined as the "right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220 (1959); *see also* Fisher v. District Court of Sixteenth Judicial Dist., 424 U.S. 382 (1976); Kennerly v. District Court of Ninth Judicial Dist., 400 U.S. 423 (1971). The Court discussed, but did not apply, this ground in McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973), and White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

211. Montana v. Crow Tribe of Indians, 484 U.S. 997 (1988).

212. 109 S. Ct. 1698 (1989).

213. *Id.* at 1703.

214. 25 U.S.C. § 398c (1982).

215. *Cotton,* 109 S. Ct. at 1703.

216. The Court seemed to believe that these objections were the result of a footnote in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). *Cotton,* 109 S. Ct. at 1703, 1713 n.18.

217. *Id.* at 1703.

lief.[218] The district court, applying preemption analysis, found that because the taxes did not impact the Jicarilla Apache Tribe, New Mexico was not preempted from collecting the taxes.[219] The New Mexico Court of Appeals affirmed the district court's ruling.[220]

The New Mexico Court of Appeals focused primarily on the commerce clause and due process clause aspects of Cotton's argument.[221] The court found that despite the emphasis of prior United States Supreme Court decisions on examining the relative federal and state responsibilities, the Constitution did not require that state-imposed taxes should be equivalent to the value of state services provided to tax payers.[222] Moreover, the court determined that Cotton failed to prove that the state taxes imposed an impermissible burden on interstate commerce.[223] The court concluded that because Cotton had not proven that there was an impact on the Jicarilla Apache Tribe, the 1938 Act did not preempt the state from collecting the taxes.[224] The New Mexico Supreme Court declined to hear Cotton's appeal of the lower court's decision,[225] and the United States Supreme Court granted certiorari.[226]

A. The Court's Opinion: Vindication of a Decade of Dissent

The Supreme Court, in an opinion by Justice Stevens, affirmed the decision of the New Mexico Court of Appeals.[227] The first and most significant portion of the opinion concerned Cotton's supremacy clause challenge. Cotton argued that the IRA, the 1938 Act, and the extensive tribal and federal regulatory control over Cotton's activities preempted New Mexico's imposition of the oil taxes because the taxes created a significant economic burden

218. Cotton Petroleum v. State, 106 N.M. 517, 519, 745 P.2d 1170, 1172 (Ct. App. 1987), *cert. quashed,* 106 N.M. 511, 745 P.2d 1159 (1987), *aff'd,* 109 S. Ct. 1698 (1989).

219. *Id.*

220. *Id.* at 522, 745 P.2d at 1175.

221. The appellate court's emphasis on the commerce and due process clauses probably reflects the competing theories advanced by the parties in the case. *Id.* at 519, 745 P.2d at 1172. Cotton argued that the primary focus should be on whether the state and tribal taxation, taken together, impermissibly interfered with interstate commerce. *Id.* Cotton deemphasized preemption in its theory of the case, using it as a backdrop to the commerce clause issue. *Id.* The state, in contrast, argued that its interest should prevail under either a commerce clause analysis or, alternatively, a preemption analysis. *Id.* The tribe, as an amicus, suggested preemption as the proper theory and argued that state taxes impermissibly compromised the purpose of the 1938 Act, which was to maximize tribal revenue. *Id.*

222. *Id.* at 520, 745 P.2d at 1173.

223. *Id.* at 521, 745 P.2d at 1174.

224. *Id.* at 521-22, 745 P.2d at 1174-75.

225. Cotton Petroleum v. State, 106 N.M. 511, 745 P.2d 1159 (1987).

226. 485 U.S. 1005 (1988). *See also supra* note 28.

227. *Cotton,* 109 S. Ct. at 1705.

on the tribe.[228] The Court rejected these arguments, reasoning that neither the 1938 Act nor the IRA explicitly repealed the 1927 statute[229] that granted the state authority to tax the production of this resource.[230]

The Court also noted that Congress, when it passed the 1938 Act, did not expect that the doctrine of federal immunity from state taxation would protect non-Indian energy developers doing business with the tribes.[231] Therefore, the Court opined that the 1938 Act's silence regarding state taxation did not repeal an earlier express waiver of immunity.[232] Furthermore, the Court accepted the state court's findings that the tribe did not suffer an economic burden as a result of the state taxes. It also acknowledged that the state performed significant services on the reservation to justify the state's jurisdiction to impose the taxes.[233]

B. The Dissent

Justice Blackmun,[234] in his dissent, rejected the Court's reading of the historical context of the 1938 Act.[235] Noting the relative timing of the case that limited the doctrine of intergovernmental immunity[236] and the 1938 Act, the dissent maintained that the Court could not consider congressional knowledge of the lack of federal immunity from state taxes as conclusive evidence that Congress, by remaining silent, intended to authorize states to

228. *Id.* at 1708. The Court listed several applicable federal and tribal regulations. *Id.* at 1712 n.16.

229. The Act of May 29, 1924, 25 U.S.C. § 398 (1982). *See also supra* note 167.

230. *Cotton,* 109 S. Ct. at 1710.

231. *Id.* at 1710-11. *See also supra* notes 78-80 and accompanying text.

232. *Cotton,* 109 S. Ct. at 1710-11. This complicated argument relies on the relative timing of the passage of the 1938 Act and the Court's decision in Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938). Although Congress drafted the 1938 Act before *Mountain Producers* was issued, *see infra* note 237, the Court found this point unpersuasive because the result of *Mountain Producers* was "plainly foreshadowed by the development of the law . . . during the preceding decade." *Cotton,* 109 S. Ct. at 1711 n.13.

233. *Id.* at 1712. Compare the *Cotton* Court's deference to the state court's finding with the Ninth Circuit's rejection of the federal district court's findings in *Crow II.*

The Court also found that Indian tribes are not states within the meaning of the commerce clause: "[T]he language of the Clause no more admits of treating Indian tribes as States than of treating foreign nations as States." *Id.* at 1716. Cotton's argument, which the Court found "most persuasive," albeit still unsuccessful, was that tax payments were impermissibly disproportionate to the amount of services provided. *Id.* at 1714. The Court rejected this argument, noting that the due process clause does not mandate a perfect fit, or even a reasonable relationship, between taxes and benefits received. *Id.* at 1714-15.

234. Justice Blackmun was joined in his dissent by Justices Brennan and Marshall. *Id.* at 1716.

235. *Id.* at 1717-22 (Blackmun, J., dissenting).

236. Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938).

impose taxes.[237] More importantly, the fact that the IRA intervened between the 1927 waiver and the 1938 Act persuaded the dissent that the Court was revisiting, and in effect overruling, its earlier decision in *Blackfeet.*[238]

Justice Blackmun asserted further that even without evidence of congressional intent, the Court should hold, based on prior preemption jurisprudence, that New Mexico was without authority to levy the oil taxes.[239] The dissent also compared the discrepancy between the amount of the tax allowed in this case (eight percent) with the taxes that had been disallowed in *Warren Trading Post* (two percent) and *Bracker* (less than one percent), indicating that previous decisions demonstrated a low tolerance for state taxes on non-Indians doing business with the tribes on the reservations.[240]

V. AFTER *COTTON:* THE NEW CRITERIA

The opinion in *Cotton* represents a marked departure from previous Supreme Court jurisprudence. The extent of this departure is evident from a point-by-point comparison of the elements of the *Bracker* balancing test that the Court applied in *Cotton* with the elements applied in prior decisions.

A. The New Balancing Test: A Thumb on the Scales

1. The Amount of the Tax

The dissent in *Cotton* asserted that the taxes allowed by the *Cotton* majority greatly exceeded those prohibited in *Warren Trading Post* and *Bracker.*[241] The fact that the low level of taxation involved in those cases did not control their outcomes demonstrated persuasively that the amount of tax was not an important issue.[242] Yet, the Court reconciled apparently contradictory results between *Cotton* and *Crow II* precisely because of the amount of the tax. The *Cotton* Court distinguished *Crow II* on the grounds that the taxes at issue there were extraordinarily high.[243]

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237. *Cotton,* 109 S. Ct. at 1718-22. The dissent challenged the Court's chronology, pointing out that the 1938 Act was drafted before the opinion in *Mountain Producers* was issued. *Id.* at 1718-19. *See also supra* note 232. Given the possibility of opposite conclusions based on the same facts, use of this evidence in either opinion cannot be considered persuasive.

238. *Cotton,* 109 S. Ct. at 1719.

239. *Id.* at 1722.

240. *Id.* at 1726.

241. *Id.*

242. *See supra* notes 85, 143-44 and accompanying text.

243. *Cotton,* 109 S. Ct. at 1713 n.17. In *Crow II,* the tribal tax was equal to 84% of the state tax. *See supra* note 183 and accompanying text. In *Cotton,* the tribal tax was equal to 75% of the state tax. *See Cotton,* 109 S. Ct. at 1703. The approximate equivalence of the ratios of state to tribal tax rates in *Cotton* and *Crow II* suggests that, because different re-

The *Cotton* Court's departure from the level of taxation analysis used in the past undoubtedly will lead states to attempt to find the maximum allowable tax rates for economic activity of non-Indians conducted on reservations. At the very least, because Montana lowered the tax at issue in *Crow II* for other reasons,[244] it may try again to tax the non-Indian producers of Crow coal. Of course, the state must meet the threshold test of advancing a legitimate interest,[245] a threshold the *Cotton* Court's decision significantly lowered.

2. The State Interest

In addition to the size of the tax, the lack of a corresponding legitimate state interest was a basis for the Ninth Circuit's rejection of the state tax in *Crow II.*[246] In *Cotton,* the state interest, aside from raising revenue, was not well defined. The *Cotton* opinion only identified that the state provided some services and regulated the spacing and inspection of wells.[247] The *Crow II* court, in contrast, considered whether the specific taxing statute was narrowly tailored to achieve a state interest.[248] The Court, however, did not apply a comparable test in *Cotton.* Had the *Cotton* Court employed such a test, the fact that the tax statutes did not include language for the provision of services certainly would have worked against upholding the validity of the taxes.[249] The tax statutes themselves did not indicate that they were enacted for any purpose other than raising revenues, a purpose identified by the Court in *Bracker,*[250] *Ramah,*[251] and *Crow II*[252] as not sufficiently legitimate.

As evidence of nonrevenue interests, the amount of services New Mexico provided in *Cotton* was certainly not unique, particularly in comparison to the similar or greater levels of regulatory and support services in *Moe,*[253] *Ramah,*[254] *Crow II,*[255] and *McClanahan.*[256] The state interests, evidenced

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sources with different economies are involved, the Montana tax at issue in *Crow II* was not "extraordinary."

244. *See* MONT. CODE ANN. § 15-35-103(1)(b)-(c) (1989).

245. Crow Tribe of Indians v. Montana, 819 F.2d 895, 900 (9th Cir. 1987), *aff'd,* 484 U.S. 997 (1988) (*Crow II*).

246. *Id. See also supra* notes 193-204 and accompanying text.

247. *Cotton,* 109 S. Ct. at 1712.

248. *See supra* note 206 and accompanying text.

249. *See* N.M. STAT. ANN. §§ 7-29-1 to -8, 7-30-1 to -14, 7-31-1 to -11, 7-32-1 to -15, 7-34-1 to -9 (1986).

250. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 150 (1980).

251. Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 845 (1982).

252. Crow Tribe of Indians v. Montana, 819 F.2d 895, 902 (9th Cir. 1987), *aff'd,* 484 U.S. 997 (1988).

253. Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 476 (1976).

254. *Ramah,* 458 U.S. at 844.

by the services provided, failed to control those cases because of federal services and regulatory structures, which the Court presumed were sufficient to meet the tribes' needs. After *Cotton,* this presumption of federal sufficiency may be disregarded. So long as the state provides services, the Court may find that the state has a legitimate interest in taxing even when a federal regulatory structure exists.

3. The Federal Regulatory Structure

The *Cotton* Court stated, without explanation, that the federal regulations in *Bracker* and *Ramah* excluded state involvement, but that the federal regulations in *Cotton* did not.[257] The lack of exclusivity was not self evident in the *Cotton* regulations. Nor was the exclusive nature of the regulation involved clearly articulated in the prior cases.[258]

In fact, the state regulatory responsibilities cited in *Cotton*[259] appeared to duplicate federal and tribal regulations.[260] The Court did not make clear how a state, undertaking on its own initiative to provide services duplicative of or supplementary to federal or tribal services, could gain jurisdiction to tax non-Indian businesses in situations where, without such services, the Court prohibited such taxes. The concept of supremacy is defeated if a state may circumvent preemption of its laws by unilateral action absent congression grant. Although a state probably cannot bootstrap itself into direct taxation of tribal interests, it may now, by providing services, gain taxation jurisdiction over non-Indians with whom the tribe may conduct its economic affairs.

4. The Incidence of the Tax

The Court distinguished its result in *Cotton* from the apparently contradictory result in *Blackfeet* by emphasizing that the legal obligation to pay the tax was on the contractor rather than on the tribe.[261] In both *Blackfeet* and *Cotton,* the non-Indian producer had a legal obligation to pay taxes. Yet, in *Blackfeet,* the state taxed the whole value of the oil, whereas in *Cotton,* the state taxed the value of the oil after royalties to the tribe had been

255. Crow Tribe of Indians v. Montana, 484 U.S. 997 (1988).

256. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 n.12 (1973).

257. *Cotton,* 109 S. Ct. at 1712-13.

258. *See, e.g.,* Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 841 n.5 (1982).

259. *Cotton,* 109 S. Ct. at 1712.

260. *Compare* N.M. STAT. ANN. § 70-2-12 (1989) (listing regulatory responsibilities of the Oil and Gas Commission) *with* 43 C.F.R. §§ 3160-3186 (1988) (listing regulations of the Department of Interior concerning leases of Indian lands).

261. *Cotton,* 109 S. Ct. at 1711 n.14.

paid.[262] Therefore, the New Mexico tax at issue in *Cotton* did not explicitly apply to any tribal interests. However, statutory incidence in the tax statute did not save the taxes in *Warren Trading Post,*[263] *Bracker,*[264] and *Ramah.*[265] In those cases, the tax burden fell on the tribes, not by operation of state law, but simply by virtue of the tribes' relationships with non-Indian businesses.

The problem raised in *Crow I* regarding the indirect economic effects on a tribe because of a tax imposed on non-Indian producers remains. In *Crow I,* the Ninth Circuit determined that even a tax the tribe was not obligated to pay could still injure the tribal economy, thereby compromising the federal goal of economic self sufficiency.[266] The Court in *Cotton* dismissed this point, noting that although it could reasonably infer some damage, Cotton had not proved that the tribe would be sufficiently injured.[267] In contrast, the Court did not clarify whether the successful challengers of state taxes in *Warren Trading Post, Bracker, Ramah,* and *Blackfeet* had to meet a similar burden. In *Crow II,* the Ninth Circuit explicitly made "negligible impact" the threshold beyond which the state could not impose taxes without showing a sufficiently legitimate state interest.[268] The *Cotton* holding represents a significant change in the standard for permissible taxation. Thus, by raising the threshold of tribal injury, and by removing from the state the burden of establishing the threshold injury, the *Cotton* Court makes a successful challenge of state taxes considerably more difficult.

5. *The Role of Congressional Intent*

By shifting the focus of preemption analysis from the probable impact on tribal economic life to the intent of Congress,[269] the Court's holding in *Cot-*

262. N.M. STAT. ANN. §§ 7-29-4.5(A)(2), 7-30-5(A)(2), 7-31-5(B), 7-32-5(A)(2) (1986).

263. Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 686 n.1 (1965).

264. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980).

265. Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 843 (1982).

266. Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1113 n.13 (9th Cir. 1981), *amended,* 665 F.2d 1390 (9th Cir.), *cert. denied,* 459 U.S. 916 (1982) (*Crow I*).

267. *Cotton,* 109 S. Ct. at 1713.

268. Crow Tribe of Indians v. Montana, 819 F.2d 895, 900 (9th Cir. 1987), *aff'd,* 484 U.S. 997 (1988) (*Crow II*).

269. The first clause of the Court's opinion on preemption illustrates the new focus: "[D]etermining whether federal legislation has pre-empted state taxation . . . is primarily an exercise in examining congressional intent." *Cotton,* 109 S. Ct. at 1707. Justice Stevens' majority opinion in *Cotton* brought the *Bracker* balancing test into line with his dissent in that case. *See supra* notes 143-46 and accompanying text. The *Cotton* holding also echoes Justice Stevens' dissent in *Cabazon,* that the statutes and broad policy statements the Court cited in that case were not sufficiently related to the issue there raised. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 220 (1987) (Stevens, J., dissenting). In *Cotton,* the Court refused to apply *Blackfeet's* liberal statutory construction whereby a broad statement of congressional intent with respect to the IRA controlled more specific statutes. *Cotton,* 109 S. Ct.

ton permits states to impose taxes on non-Indian economic activity on reservations because states are freed from the broad congressional policy statements that previously preempted such taxation. With this more narrow reading of congressional intent, states need only heed specific congressional limitations on their jurisdiction. This change spells the end of the preemption of taxes on all interest but that of the tribes.

Congress is not likely to enact specific language to extend tax exemption beyond the tribes for two reasons. First, as a practical matter, Congress would have to anticipate and address all potential business relationships between tribes and non-Indians. Even if achieving this first step was possible, it is not clear whether Congress, whose members are particularly sensitive to state interests, could impartially mediate the state versus tribe conflict. This latter problem cuts right to the heart of the lack of a distinct tribal role in the federalist structure. Realistically, Congress could not favor tribal interests over those of the states its members represent. Similarly, the executive branch might be unwilling, for political reasons, to favor the interests of the tribes over those of the states. If neither political branch of government is willing to advocate tribal interests, and if the judicial branch employs a narrow reading of congressional intent to determine the rights of tribes, tribal interests will always be subordinated to state interests. Consequently, the federal system of checks and balances will fail to protect the tribes.

B. Self Determination Descendant

As a result of *Cotton,* states can more easily extend taxation jurisdiction onto Indian reservations. After *Cotton,* not only is the states' burden of showing a legitimate interest lessened, but the burden on the challenger of the tax to show damage to the tribe at the specific tax level is greater than in the past. In addition, post-*Cotton,* the tribe or other parties challenging the tax must show that the damage to the tribe is more than nominal, a marked departure from past law. With these changes, the *Cotton* decision represents

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at 1710. The Court, therefore, "corrected" another decision with which Justice Stevens had disagreed. *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 768 (1985) (White, J., dissenting).

By not explicitly rejecting the outcome of *Blackfeet,* the Court is in effect holding that the IRA suffices as a policy statement to render the general repealer in the 1938 Act effective against taxes on Indian mineral interests. This result implies, however, that the IRA was not sufficient as a policy statement to render the same general repealer effective against the same previous tax authorizing statute as applied to non-Indian development of the same interests. The Court's analysis does not completely explain this distinction. Personnel changes at the Supreme Court undoubtedly played a significant role. Justice Powell, the author of the decision in *Blackfeet,* resigned from the Court, and Justice Kennedy, who had joined the dissent in *Blackfeet* when the case was in the Ninth Circuit, was appointed to the Court in the interval between *Blackfeet* and *Cotton.*

an invitation to state legislatures to test the limits of their taxation jurisdiction in Indian country.

States can expect to avail themselves of new revenue by taxing non-Indians doing business with the tribes, with obvious consequences. If a tribe attempts to impose its own tax, the non-Indian developer may either accept a double tax or invest in resources elsewhere. Thus, the tribes are forced into a decision between foregoing tax revenue or foregoing development of tribal resources, and if the tribes forgo revenue, whether in the form of taxes, royalties, or jobs, they will forego independence and self-determination . Furthermore, in an era of massive federal budget deficits, the tribes cannot rely on the Federal Government to cover the foregone tribal revenue, even if the tribes so desire. Therefore, the tribes, in effect, can no longer afford to provide services. Only time will tell whether states will seek to gain responsibility for providing services as eagerly as they sought to extend their taxation jurisdiction over the tribes' resources.

VI. CONCLUSION

Provided the IRA self-determination model is still the statutory framework within which federal responsibilities to Indians are exercised, the result of *Cotton* presents serious problems. Tribal economies clearly can be damaged by state taxation of non-Indian businesses that help develop tribal resources. For this reason, the Supreme Court has been unwilling to allow state taxation to encompass the reservations. While there were cases in which the Court found that states had taxation jurisdiction over non-Indian purchase of tribal resources, these were limited exceptions allowed by the Court because the economies in question were artificial creations. The decision in *Cotton Petroleum Corp. v. New Mexico* reverses this general trend, making state taxation of non-Indian developers on the reservation the norm, and protection of tribal economies the exception. Damage to Indian economies, because of the relationship of tribal economy to tribal identity, cannot be repaired by federal expenditures, even if such expenditures were possible. As Indian economies suffer, the IRA vision of self-sufficient tribal societies will become unattainable. The United States Supreme Court, while depriving the tribes of an important route to independence, did not spell out an alternative course.

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